

EEOC Proposed Genetic Information Nondiscrimination Act Rule Permits Incentives in Wellness Programs for Spouse Health Information

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In a shift, the U.S. Equal Employment Opportunity Commission has issued a proposed rule clarifying that the Genetic Information Nondiscrimination Act (“GINA”) does not prohibit employers from offering limited incentives to employees when their covered spouses provide information about their current and past health status in a health risk assessment (“HRA”). The HRA must be offered as part of a voluntary wellness program that is part of a group health plan.

The proposal reflects a change from the agency’s position that such incentives could violate GINA based on the statute’s broad definition of “genetic information.” That definition includes information about a family member’s (including a spouse’s) current or past health status.

The EEOC invites the public to comment on the proposed rule, referencing RIN 3046-AB02, by December 29, 2015. After the comment period, EEOC will evaluate the comments, make revisions to the proposed rule, and vote on a final rule.

Proposed Rule

Under the proposed rule, an employer may offer limited incentives to employees when their covered spouses complete an HRA as part of a voluntary wellness program. Incentives may be financial or in-kind and structured as rewards or penalties. Examples include reductions in employees’ health care insurance premiums, increased employer contributions to health savings accounts, and cash or non-cash prizes. HRAs may include a medical questionnaire about current and past health status, a medical examination (such as high blood pressure or cholesterol screenings), or both.

Wellness Programs

A wellness program must be reasonably designed to promote health and prevent disease in the participants. To satisfy that standard, the EEOC would impose requirements similar to those it proposed earlier this year for wellness programs under the American with Disabilities Act. That is, the program must not be overly burdensome, a subterfuge for violating GINA or other employment discrimination laws, or highly suspect in the method chosen to promote health or prevent disease. Programs that would *not* be reasonably designed to promote health or prevent disease include those that impose an overly burdensome amount of time for participation as a condition to obtaining a reward, require intrusive procedures, or place significant costs on the employee.

Restrictions, Authorizations

The proposed rule clarifies that when an incentive is offered for a covered spouse’s current or past health status information as part of an HRA, spouses, like employees, must give prior, knowing, voluntary, and written authorization to provide the information. Authorizations must describe confidentiality protections and restrictions on the disclosure of the information, as well as the type of genetic information that will be obtained and the general purposes for which it will be used. Authorizations may be in an electronic format and a separate authorization from the employee is not required.

However, no incentives may be offered in exchange for a spouse providing his or her own genetic

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information (as compared to the spouse's current or past health status), including for the results of genetic tests, the current or past health status of the employee's children, or genetic information regarding the employee's child.

Dollar Limitations

The total incentive for participation in a wellness program may not exceed 30 percent of the total annual cost of the health insurance plan in which the employee and any dependents are enrolled. This limitation includes any other incentives permitted under the ADA. Plan sponsors will have to consider how these caps will coordinate with the incentive caps imposed under the Affordable Care Act.

The proposed rule also would add a requirement for incentives to be apportioned between employees and spouses in connection with programs that provide inducements to employees' spouses to provide information about the spouses' own current or past health status. Under the proposed rule, the maximum share of the incentive attributable to the employee's participation in the wellness program would be equal to 30 percent of the cost of individual coverage. The remainder of the incentive (equal to the total incentive minus the employee's incentive) would be attributable to the covered spouse's provision of current or past health status information as part of the wellness program. In the preamble to the proposed rule, the EEOC notes that the remainder of the incentive may be made available to the employee, spouse, or other dependents for participatory or health contingent programs, so long as those programs do not request genetic information or include disability-related inquiries or medical examinations.

No Waivers

Employers may not condition participation in a wellness program or provide any incentive in exchange for any agreement permitting the sale of genetic information, including information about current or past health status of an employee's family member, or waiving limitations on disclosure. Nothing in the proposed rule limits any protections under the ADA.

Requests for Comments

The EEOC has requested comments on the following:

- Whether employers that offer inducements to encourage the spouses of employees to disclose information about current or past health also must offer similar inducements to persons who choose not to disclose such information, but who instead provide certification from a medical professional stating the spouse is under the care of a physician and any medical risks identified by that physician are under active treatment.
- Should the proposed authorization requirement apply only to wellness programs that offer more than *de minimis* rewards or penalties to employees whose spouses provide information about current or past health status as part of a HRA? If so, how should the Commission define "*de minimis*"?
- Which best practices or procedural safeguards ensure that employer-sponsored wellness programs are designed to promote health or prevent disease and do not operate to shift costs to employees with spouses who have health impairments or stigmatized conditions
- Should the rule include more specific guidance to employers regarding how to implement the confidentiality requirements of 29 CFR 1635.9(a) for electronically stored records? If so, what procedures are needed to achieve GINA's goal of ensuring the confidentiality of genetic information with respect to electronic records stored by employers?
- Are there best practices or procedural safeguards to ensure that information about spouses' current health status is protected from disclosure?
- Should the rule restrict the collection of any genetic information by a workplace wellness program to only the minimum necessary to directly support the specific wellness activities, interventions, and advice provided through the program? Should programs be prohibited from accessing genetic information from other sources, such as patient claims data and medical records data?
- Whether employers offer (or are likely to offer in the future) wellness programs outside of a group health plan or group health insurance coverage that use inducements to encourage employees' spouses to provide information about current or past health status as part of a HRA, and the extent to which the GINA rules should allow inducements provided as part of such programs.

If you have any questions about the proposed rule or other wellness program compliance matters, please contact the Jackson Lewis attorney with whom you regularly work.

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